IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR SERVICES, INC.,	)	**ARBITRATION AWARD**
	)	
	)	**LARSON**
and	)	**PROBATIONARY**
	)	**APPOINTMENT**
	)	**GRIEVANCE**
	)	
CITY OF MAPLEWOOD	)	
	)	**BMS CASE NO. 07-PA-0408**

Arbitrator:	Stephen F. Befort
Hearing Date:	May 15, 2007
Date post-hearing briefs received:	June 8, 2007
Date of decision:	July 19, 2007
	APPEARANCES
For the Union:	Marylee Abrams
For the Employer:	Chuck Bethel

INTRODUCTION

Law Enforcement Labor Services, Inc. (Union) is the exclusive representative of a unit of police officers employed by the City of Maplewood (Employer). The Union, in this grievance, claims that the City violated the parties' collective bargaining agreement by reinstating Officer Dan Larson on a probationary appointment following a period of medical layoff. The grievance proceeded to an arbitration hearing at which the parties

were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

1) Is the grievance alleged arbitrable under the parties' collective bargaining agreement?

2) If arbitrable, did the Employer violate the parties' agreement by reinstating the grievant to a probationary appointment following a period of medical layoff?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2
RECOGNITION

2.1 The EMPLOYER recognizes the UNION as the exclusive representative, under Minn. Stat. 179A.03, Subd. 8 for all police personnel in the following job classifications:

Police Officer
Police officer – Dog Handler
Police Officer - Paramedic

ARTICLE 5
EMPLOYER AUTHORITY

5.1 The EMPLOYER retains the full and unrestricted right to . . . perform any inherent managerial function not specifically limited by this AGREEMENT.

5.2 Any term and condition of employment not specifically established by this AGREEMENT shall remain solely within the discretion of the EMPOYER to modify, establish, or eliminate.

ARTICLE 7
EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

7.1 Definition of a Grievance – A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.

7.5 Arbitrator's Authority

7.5a The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. . . .

7.5b . . . The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

ARTICLE 9
SENIORITY

9.2 During the probationary period a newly hired or rehired employee may be discharged at the sole discretion of the EMPLOYER. During the probationary period promoted or reassigned employees may be replaced in their previous position at the sole discretion of the EMPLOYER.

9.3 A reduction of workforce will be accomplished on the basis of seniority. Employees shall be recalled from layoff on the basis of seniority. Employees on layoff shall have an opportunity to return to work within two years of the time of their layoff before any new employee is hired.

ARTICLE 31
WAIVER

31.2 . . . All agreements and understandings arrived at by the parties are set forth in writing by this AGREEMENT for the stipulated duration of this AGREEMENT.

FACTUAL BACKGROUND

The grievant, Dan Larson, has worked as a patrol officer for the City of Maplewood since 1999. During his first year of employment, Officer Larson successfully completed an initial probationary period with the result that the Employer thereafter could terminate his employment only for cause.

In August 2004, Officer Larson was "choked out" while preparing for a use of force training session. It was later determined that Officer Larson had experienced a hypoxic stroke due to a lack of oxygen. It is not uncommon for a hypoxic stroke to

trigger psychological abnormalities. In Officer Larson's case, he experienced three psychotic episodes in the months following the stroke.

The Employer placed Officer Larson on medical leave in December 2004. An examining physician selected by the Employer recommended that Officer Larson not be permitted to return to duty until he was symptom-free for a full year. The Employer's personnel policies authorize a maximum one-year period of medical leave. The Employer granted Officer Larson leave for the full one-year period during which he received disability pay and spent down accrued sick and vacation pay.

The Employer subsequently adopted a new "medical layoff" policy. Under this policy, the Employer may authorize up to an additional one year of leave without pay for employees who are unable to work because of a medical condition. The Employer placed Officer Larson on medical layoff status as of December 2005. Pursuant to the new policy, an employee on layoff status is eligible for reinstatement upon the occurrence of two conditions: 1) receiving medical clearance to return to work, and 2) the existence of a vacant position for which the employee is qualified. If both of these prerequisites do not occur within the one-year layoff period, the employment relationship for that employee is terminated.

During the summer of 2006, both Officer Larson's treating physician and a physician retained by the Employer cleared Officer Larson to return to work. Greg Copeland, the Interim City Manager, authorized Officer Larson's reinstatement in a letter dated September 29. 2006. The letter states:

> Based on Chief Thomalla's recommendation, I am reinstating you to the position of probationary full-time Police Officer for the City of Maplewood. Your effective date of reinstatement is Monday, October 2, 2006 and your monthly pay will be $5,100.25, which is the step you were at when you went out on leave.

> You will serve a one-year probationary period in accordance with the Maplewood Police Civil Service Commission Rules and Regulations.

The Union's grievance challenges the Employer's decision to condition Officer Larson's reinstatement upon the requirement that he serve an additional probationary period.

At the arbitration hearing, Chief Thomalla testified that he recommended that Officer Larson serve a second probationary period because of the possibility that Officer Larson might suffer an additional psychotic episode. Chief Thomalla stated that the possibility of such an occurrence could implicate significant safety and liability concerns.

POSITIONS OF THE PARTIES

Union Position:

The Union initially contends that this grievance is arbitrable because it involves a dispute concerning the interpretation and application of the seniority provisions contained in Article 9 of the parties' collective bargaining agreement. With respect to the merits, the Union argues that both the agreement and the pertinent Police Civil Service Commission Rules contemplate only a single probationary period for newly hired or rehired employees. According to the Union, once an officer has successfully completed that initial probationary period he or she attains tenured status and may be terminated only for cause. Since Officer Larson's status in this instance was that of a tenured employee recalled from medical layoff, the Union claims that the Employer acted unlawfully by conditioning his recall upon the imposition of a second probationary term.

Employer Position:

The Employer maintains that the grievance should be denied for either of two reasons. First, the Employer argues that this dispute is not arbitrable. The Employer asserts that the Police Civil Service Commission Rules rather than the collective

bargaining agreement delineates the circumstances in which the Employer may utilize a probationary appointment. As such, the Employer claims that the instant grievance does not require either the interpretation or application of the terms of the collective bargaining agreement. Second, even if the dispute is deemed to be arbitrable, the Employer contends that the grievance should fail on the merits because the Employer has the authority to impose a probationary appointment upon the "reinstatement" of an employee. In this instance, the Employer argues that it had reasonable grounds to require a probationary appointment upon reinstatement due to the public safety danger posed by a potential relapse.

DISCUSSION AND OPINION

Arbitrability

A matter is "arbitrable" if it comes within the jurisdictional parameters established by law and contract for arbitral resolution. Under Minnesota's Public Employment Labor Relations Act (PELRA), all collective bargaining agreements covering public employees must include a grievance procedure culminating in binding arbitration. Minn. Stat. § 179A.20, subd. 4(a). PELRA defines a "grievance" as "a dispute or disagreement as to the interpretation or application of any term or terms of any contract required by section 179A.20." Minn. Stat. § 179A.21, subd. 1. The Minnesota Supreme Court has recognized that "a liberal and broad construction of the term 'grievance' as used in collective bargaining agreements should be given in the interest of encouraging the use of machinery which has been set up for peaceful settlement of disputes." Ekstedt v. Village of New Hope, 292 Minn. 152, 161, 193 N.W.2d 821, 827 (1972).

While the United States Supreme Court concurs that a finding of arbitrability generally is favored, the Court also has made clear that the parties are free to withhold matters from arbitration by the terms of their contractual arrangement. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). Ultimately, the issue of arbitrability is a matter governed by the terms of the parties' collective bargaining agreement. *Id.*

The Minnesota Court of Appeals recently has provided guidance with respect to the arbitrability issue in Minnesota Teamsters Public & Law Enforcement Employees Union, Local 320 v. County of St. Louis, 726 N.W.2d 843 (Minn. Ct. App. 2007). In that case, the union and employer had reached a tentative agreement concerning health insurance co-payments, but the collective bargaining agreement ultimately executed by the parties contained no reference to that issue. When employees subsequently were charged co-payments for office visits, the union sought to compel arbitration claiming that the employer's practice violated the arrangement agreed upon during the negotiation process. The trial court as well as the court of appeals denied the union's request, finding that the asserted grievance did not implicate the "interpretation or application of any term" of the parties' contract:

> We conclude that the dispute did not arise out of the contract, but rather out of the tentative agreement and the letter agreements that preceded the CBA. Both the law and the CBA limit grievances to terms within the contract. Because the tentative and letter agreements are outside of the CBA . . . we conclude that the district court did not err in granting the county's motion for summary judgment. . . .

726 N.W.2d at 850.

The logic of the County of St. Louis decision compels a similar result in this instance. Here, the parties' contract defines an arbitrable grievance as "a dispute or

disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT." The grievance asserted by the Union challenges the Employer's decision to require Officer Larson to serve on a probationary appointment upon his recall from medical layoff. The parties' collective bargaining agreement, however, is wholly silent as to the circumstances in which a probationary appointment may be required. That issue is governed instead by the Employer's Police Civil Service Commission Rules which provide as follows in Section 15:

> Original, promotional, transferred, and reinstated employees shall be on probation for a period of one year continuous employment in the Department, or 2080 hours continuous employment for part-time employees, and the employee may be discharged at any time during the probationary period with or without cause by the City Manager. A promotional appointee – to the rank of sergeant or higher – if found unsatisfactory, shall be reinstated to his/her former position in the seniority of his/her previous rank.

Since the grievance seeks the interpretation of the civil service rules rather than the parties' contract, it is, as in the Count of St. Louis matter, beyond the scope of the grievance process set out in the parties' contract. Accordingly, I conclude that the Union's grievance in this case is not arbitrable.

The Merits

Having determined that this matter is not arbitrable, I am without jurisdiction to rule on the merits of Mr. Larson's grievance. This does not mean that I either agree or disagree with the Employer's decision to recall Officer Larson subject to a probationary appointment. It also does not represent any sort of determination as to whether the Employer may terminate Officer Larson's employment without cause during the probationary appointment. It simply means that the determination of these issues is vested in a forum other than this arbitration proceeding.

AWARD

The grievance is denied.

July 19, 2007

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Stephen F. Befort
Arbitrator